

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7556

Petition of Global NAPs, Inc. for declaratory judgment)	
and request for interim injunctive relief against)	Hearing at
Telephone Operating Company of Vermont, LLC, d/b/a)	Montpelier, Vermont
FairPoint Communications, for unauthorized billing of)	October 13, 2009
switched access usage services for termination of voice)	
over internet protocol ("VoIP") traffic.)	

Order entered: 11/24/2009

ORDER DENYING PRELIMINARY INJUNCTION

I. INTRODUCTION

In this Order, I deny the request of Petitioner Global NAPs, Inc. ("GNAPs") in this docket for preliminary injunctive relief against Telephone Operating Company of Vermont, LLC, d/b/a FairPoint Communications ("FairPoint"). My decision rests on two grounds: (1) due to the existence of material facts in dispute and related questions of contractual interpretation raised by GNAPs, I cannot conclude at this stage in this proceeding that GNAPs is more likely than not to succeed on the merits of its claim that it is not liable for certain charges assessed by FairPoint pursuant to an interconnection agreement (the "Interconnection Agreement") that has been in effect since February 2003; and (2) GNAPs has not demonstrated sufficient grounds for me to conclude that it will suffer an irreparable injury if preliminary injunctive relief is not granted.

II. PROCEDURAL BACKGROUND

On July 24, 2009, GNAPs filed a petition for declaratory judgment and preliminary injunctive relief against FairPoint.¹ GNAPs' filing was prompted by a letter it had received from

1. The full title of GNAPs' pleading is: *Complaint and Petition for Declaratory Judgment and Request for Interim Injunctive Relief of Global NAPs, Inc. Against FairPoint Vermont, Inc. For Unauthorized Billing of Switched Access Usage Services for Termination of Voice Over Internet Protocol ("VoIP") Traffic*, and is dated July 24, 2009 (hereinafter "GNAPs Petition").

FairPoint dated June 15, 2009, in which FairPoint notified GNAPs of FairPoint's intent to cease providing services to GNAPs due to failure to cure certain alleged payment defaults under the Interconnection Agreement, as well as pursuant to a tariff for access services.²

On September 10, 2009, a prehearing conference and evidentiary hearing were duly noticed for September 29, 2009.

On September 22, 2009, GNAPs filed a motion seeking leave for William J. Rooney, Jr., Esq., to appear *pro hac vice* in this proceeding on behalf of GNAPs.

On September 24, 2009, GNAPs filed an assented-to motion to reschedule the prehearing conference and evidentiary hearing scheduled for September 29, 2009.

On September 29, 2009, GNAPs filed a motion seeking leave for Joel Davidow, Esq., to appear *pro hac vice* in this proceeding on behalf of GNAPs.

Also on September 29, 2009, James Porter, Esq., filed a notice of appearance in this proceeding on behalf of the Vermont Department of Public Service ("Department").

On September 30, 2009, a rescheduled prehearing conference and evidentiary hearing were noticed for October 13, 2009.

On October 5, 2009, FairPoint filed an answer³ to the GNAPs Petition, as well as a motion seeking leave for Michael J. Morrissey, Esq., and Sarah Davis, Esq., to appear *pro hac vice* in this proceeding on behalf of FairPoint.

On October 13, 2009, a duly-noticed evidentiary hearing was held on GNAPs' motion for preliminary injunctive relief.⁴ The following witnesses appeared and gave sworn testimony: David Shaw, Director of Sales for GNAPs; Michael Skrivan, Vice President for Regulatory Affairs for FairPoint; Corey Chase, Acting Director for Telecommunications for the Department.

2. GNAPs Petition, Attachment A (letter from Jeffrey J. Heins, Esq., on behalf of FairPoint, to Joel Davidow, Esq., on behalf of GNAPs, dated June 15, 2009).

3. The full title of FairPoint's pleading is: *Answer of Telephone Operating Company of Vermont LLC d/b/a FairPoint Communications* (hereinafter "FairPoint Answer").

4. During the prehearing conference that preceded the evidentiary hearing, I granted all then-pending *pro hac vice* motions, none of which were opposed.

At the conclusion of the evidentiary hearing, I delivered an oral ruling from the bench in which I denied GNAPs' request for preliminary injunctive relief.⁵

III. FINDINGS

The preliminary nature of the relief sought here required a prompt hearing and thereby limited the parties' ability to offer testimony with the thoroughness that is customary in a full hearing on the merits. Time for testimony was limited. I do not intend that the findings below be binding on the parties when this docket reaches a determination on the merits. The parties should have, and they will have, a full opportunity to explore these matters in fuller detail later.

1. FairPoint is the primary land-line carrier in Vermont. It took over all operations of its predecessor, Verizon Vermont, on April 1, 2008. Tr. 10/13/09 at 84 (Skrivan).

2. GNAPs is a Delaware corporation and a public utility holding a Certificate of Public Good, issued by the Board in Docket 6162 on February 16, 1999, authorizing GNAPs to provide intrastate telecommunications services in the State of Vermont. GNAPs provides local exchange services in Vermont. Docket 6162, Order of 2/16/99; GNAPs Petition at 7.

3. GNAPs has 13 customers in Vermont, who consist of dial-up internet service providers, fax providers, residential and business VoIP providers, and enhanced service providers. Tr. 10/13/09 at 27 and 46 (Shaw).

4. According to GNAPs, approximately 80% of GNAPs' outbound traffic is VoIP traffic that GNAPs receives from customers that have identified themselves as enhanced-service providers. Tr. 10/13/09 at 30 (Shaw); exh. GNAPs-1.

5. FairPoint and GNAPs are parties to an Interconnection Agreement that has been in effect since 2003 Tr. 10/13/09 at 27 (Shaw); tr. 10/13/09 at 69 (Skrivan); FairPoint Answer at ¶ 1.

6. Under the Interconnection Agreement, FairPoint provides co-location and trunking arrangements for GNAPs. "Trunking" is a term that refers to a telecommunications facility that is dedicated to the exclusive use of a single carrier for the purpose of connecting one point in a network to another point. Tr. 10/13/09 at 69 and 75 (Skrivan).

5. Tr. 10/13/09 at 105.

7. FairPoint also terminates traffic on its network for GNAPs pursuant to the terms of FairPoint's access tariffs. Tr. 10/13/09 at 70 (Skrivan).

8. FairPoint estimates that GNAPs owes FairPoint approximately \$28.5 million in access charges and facilities charges. Tr. 10/13/09 at 71 (Skrivan).

9. FairPoint has sought to collect in excess of \$28 million from GNAPs pursuant to the terms of the Interconnection Agreement. FairPoint Answer at 2.

10. FairPoint estimates that GNAPs is accruing \$60,000 per month in total unpaid charges due for services provided by FairPoint. Of this \$60,000 in monthly charges, FairPoint estimates that \$40,000 are due for facilities provided by FairPoint pursuant to the Interconnection Agreement. Tr. 10/13/09 at 71 and 89 (Skrivan).

11. On April 20, 2009, FairPoint sent a letter to GNAPs serving notice that FairPoint considered GNAPs to be in default under the Interconnection Agreement, and that FairPoint intended to terminate services to GNAPs for failure to pay its undisputed past due balance. GNAPs Petition, Attachment B.

12. To date, GNAPs has paid nothing to FairPoint for services rendered by FairPoint to GNAPs since April of 2008. Tr. 10/13/09 at 72 (Skrivan).

13. GNAPs admits that it owes payment to FairPoint for services it has received from FairPoint. Tr. 10/13/09 at 57 (Shaw).

14. GNAPs' disputes the amount of the payment it owes FairPoint; GNAPs is willing to pay the "prevailing rate" in the telecommunications industry for interconnection arrangements, which GNAPs contends is \$0.0004 per minute of usage on FairPoint's networks. Tr. 10/13/09 at 61-62 (Shaw).

15. FairPoint contends there is no "prevailing rate" for interconnection arrangements; FairPoint has seen per minute usage rates under interconnection agreements ranging from \$0.0007 to \$0.02. Tr. 10/13/09 at 72 and 74 (Skrivan).

16. If FairPoint were to cease providing services to GNAPs, then GNAPs would not be able to continue providing service to its Vermont customers. Tr. 10/13/09 at 27 and 30 (Shaw).

17. If GNAPs could not provide service to its Vermont customers, then no call would be completed that was dialed to a number in Vermont that GNAPs was responsible for forwarding to FairPoint for termination. Tr. 10/13/09 at 27 (Shaw).

18. There are approximately 50,000 Vermont telephone numbers for which GNAPs is responsible for forwarding calls to FairPoint for termination⁶. These 50,000 numbers could be ported out. If necessary, this "porting out" process could be accomplished within a period of a few days or a few weeks, depending on the alternate providers to whom these numbers are ported out. Tr. 10/13/09 at 27-28 (Shaw).

19. If GNAPs were no longer able to serve its 13 customers in Vermont, these customers likely would be able to switch to another carrier to obtain the services formerly provided by GNAPs. Tr. 10/13/09 at 52 (Shaw); tr. 10/13/09 at 96-97 (Chase).

20. GNAPs estimates that if its ability to operate in Vermont were terminated, then GNAPs would lose in excess of \$20,000 per month in revenues. Tr. 10/13/09 at 30 and 49 (Shaw).

21. GNAPs might experience a loss of confidence from some potential customers in its ability to provide service if FairPoint were to cease providing service to GNAPs pursuant to the Interconnection Agreement. Tr. 10/13/09 at 30 and 51 (Shaw).

22. GNAPs has experienced such losses in confidence in other jurisdictions where its ability to operate has been terminated. Sometimes GNAPs has been able to overcome this loss of confidence, sometimes not. Tr. 10/13/09 at 51 (Shaw).

23. GNAPs' claim of irreparable harm from the denial of a preliminary injunction is limited to potential loss of customer confidence and monthly revenues of \$20,000. Tr. 10/13/09 at 55 (Shaw).

6. These 50,000 represent an aggregate number of the end-user customers provisioned by the 13 clients GNAPs serves in Vermont. *See* Finding 3, above.

IV. DISCUSSION

Injunctive relief is an extraordinary remedy and is not granted routinely.⁷ Board Rule 2.406(D) provides:

No preliminary injunction may issue unless the petitioner establishes that the irreparable injury which will be caused to it if a preliminary injunction is denied, discounted by the probability that the respondent will prevail in the proceeding on the permanent injunction, will be greater than any injury which the granting of the preliminary injunction will cause to the respondent.

Accordingly, it is GNAPs who bears the burden of proving that issuance of a preliminary injunction is warranted under the circumstances of this case.

In evaluating whether to grant a request for a preliminary injunction, the Board has set forth the following criteria to be considered:

- (1) the likelihood of success on the merits;
- (2) whether the party seeking relief will suffer irreparable injury if the relief is not granted;
- (3) whether the issuance of an injunction will substantially harm other parties; and
- (4) the location of the best interests of the public.⁸

With these principles in mind, I turn to consider GNAPs' request for preliminary injunctive relief.

Irreparable Harm

The showing of irreparable harm is the "single most important prerequisite for the issuance of a preliminary injunction."⁹ Irreparable harm must be shown to be imminent, not

7. Docket 6331, *Petition of Vermont Department of Public Service for a Board investigation into the business practices of MCI WorldCom, Inc.*, Order of 4/20/00 at 4 (citing *Committee to Save Bishop's House v. Medical Center Hosp. of Vermont*, 136 Vt. 213, 218 (1978)).

8. See e.g., Docket No. 5630, *Investigation of Vermont Electric Cooperative*, Order of 9/10/93 at 4.

9. *Bell & Howell v. Masel Supply Co.*, 719 F.2d 42, 45 (2d Cir. 1983).

remote or speculative, and the injury must be such that it cannot be fully remedied by monetary damages.¹⁰

Having carefully reviewed GNAPs' filing and having also considered the evidence presented at the technical hearing on October 13, 2009, I conclude that GNAPs has not sufficiently established that it "will suffer irreparable damage" if a preliminary injunction is not granted. Fundamentally, GNAPs seeks a preliminary injunction to avoid a loss of \$20,000 in monthly revenue. In the context of injunctive relief, financial harm is generally considered to be reparable after the fact.¹¹ GNAPs has presented no evidence to suggest that its case presents any grounds for not applying this firmly established legal principle.

GNAPs further claims that a preliminary injunction is needed to avert a possible loss of confidence on the part of potential customers who may be thinking about entering into service agreements with GNAPs. However, at the evidentiary hearing, GNAPs candidly acknowledged that when GNAPs has experienced the termination of its operations in other jurisdictions, GNAPs nonetheless has been able, sometimes, to overcome the ensuing loss of customer confidence.¹² Therefore, at best, GNAPs' feared loss of customer confidence remains a matter of speculation at this point in this proceeding, and this Board has previously determined that speculation cannot serve as a basis for granting extraordinary remedial relief.¹³

In sum, for the foregoing reasons, I conclude that GNAPs has not successfully carried its burden of proof to demonstrate a likelihood of irreparable harm absent issuance of a preliminary injunction.

10. See *Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 975 (2d Cir. 1989).

11. See *Campbell Inns, Inc. v. Banholzer, Turnure & Co., Inc.*, 148 Vt. 1 (1987); Docket 6331, Order of 4/20/00 at 17.

12. Tr. 10/13/09 at 51 (Shaw).

13. Docket 5841/5859, *Investigation into Citizens Utilities Company*, Order of 12/22/00 at 3 (rejecting TRO request supported by speculation concerning respondent utilities' poor creditworthiness, alleged inability to pay sums potentially due and possible ensuing rate increases for retail ratepayers). See also 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2948.1 n. 8 (2d ed. 1987) (irreparable harm must be likely to occur; speculative injury is not sufficient).

Likelihood of success on the merits

At the heart of the dispute in this docket lies a factual question about the nature of the GNAPs traffic for which FairPoint provides interconnection services in Vermont. GNAPs insists that the nature of the traffic it sends to and receives from FairPoint is internet-based or VoIP traffic and that such traffic is subject to a certain rate of compensation that differs from the rate of compensation applicable to interexchange carriers for delivering traditional toll traffic.¹⁴ FairPoint, in turn, maintains that GNAPs has failed to state a claim for which relief can be granted, and therefore has requested that GNAPs' petition be dismissed.¹⁵

Having reviewed GNAP's petition, I am persuaded that this proceeding will require the construction of the terms of the Interconnection Agreement between GNAPs and FairPoint. GNAPs has cited numerous provisions of the Interconnection Agreement to support its position that FairPoint is seeking to impose unjust and unreasonable charges upon GNAPs.¹⁶ FairPoint, in turn, has invoked other provisions of the Interconnection Agreement to support its claim that it is entitled to cancel that agreement and to terminate its services because GNAPs has failed to cure its default in paying undisputed amounts past due under the agreement.¹⁷ Furthermore, GNAPs acknowledged at the evidentiary hearing that GNAPs has staked out a position about interconnection compensation for VoIP traffic for which there is no settled consensus.¹⁸ Accordingly, at this stage in this proceeding, I cannot comfortably conclude that GNAPs has sufficiently demonstrated a likelihood of success on the merits such as to warrant granting preliminary injunctive relief at this juncture. Going forward, in the course of conducting discovery and filing direct testimony in this proceeding, GNAPs may succeed in carrying its

14. GNAPs Petition at 3.

15. FairPoint Answer at 4.

16. GNAPs Petition at 9-13. While the GNAPs Petition contains many factual assertions and legal argument to support its particular construction of the Interconnection Agreement, the petition does not contain a complete copy of the Interconnection Agreement. Nor was a copy of this document offered into evidence at the evidentiary hearing on October 13, 2009.

17. GNAPs Petition, Attachment B (letter dated April 20, 2009, from Jeffrey Heins, Esq., on behalf of FairPoint, to William J. Rooney, Esq., on behalf of GNAPs).

18. Tr. 10/13/09 at 60 (Shaw).

burden of proof to establish that the alleged sums due arise from a misconstruction on FairPoint's part of the applicable terms of the Interconnection Agreement. But for purposes of granting a preliminary injunction, I must conclude that GNAPs has failed to carry its burden of proof to demonstrate a likelihood of success on the merits of its claims.

Potential harm to FairPoint

If the preliminary injunction requested by GNAPs is issued at this time, FairPoint claims it will experience the harm of continuing to lose \$60,000 per month in revenues — revenues that FairPoint conceivably could earn from doing business with any carrier who may replace GNAPs.¹⁹ FairPoint is a company in financial distress; it cannot spare any opportunity to realize revenues.²⁰

Best interests of the Public

With respect to the location of the interests of the public, GNAPs has expressed concerns about the potential inconvenience and service outages that its customers (and their end-user customers) could experience while alternate arrangements are made to deal with the impact of FairPoint's decision to terminate services to GNAPs under the Interconnection Agreement.²¹ FairPoint counters — with support from the Department— that the affected customers would have time to make alternative arrangements, assuming GNAPs and FairPoint proceed in an orderly fashion with termination.²² Accordingly, I discern nothing in the evidentiary record to date to persuasively suggest that the interests of the public lie in sustaining GNAPs' effort to enjoin FairPoint from exercising its business judgment in availing itself of the Interconnection Agreement's termination provisions for GNAPs' alleged failure to cure a default in payment. FairPoint is aware that it is assuming the risk of liability to GNAPs for damages for wrongful termination.²³

19. Tr. 10/13/09 at 87-89 (Skrivan).

20. Tr. 10/13/09 at 84 (Skrivan).

21. Tr. 10/13/09 at 55-56 (Shaw).

22. Tr. 10/13/09 at 81-82 (Skrivan); tr. 10/13/09 at 96-97 (Chase).

23. Tr. 10/13/09 at 87-88 (Skrivan).

Balancing the effects of denying and granting the preliminary injunction

As noted above, Board Rule 2.406(D) requires that I balance the effects of denying and granting GNAPs' request for a preliminary injunction against FairPoint.

If a preliminary injunction is denied, then GNAPs faces termination by FairPoint of its services under the Interconnection Agreement. If such termination occurs, GNAPs will not be able to provide service to its Vermont customers, the consequence of which will mean a loss to GNAPs of \$20,000 per month in revenues. However substantial this potential harm to GNAPs may be, it is not irreparable in nature as, in the end, it amounts to a claim for consequential damages should FairPoint's termination decision prove to be wrongful.²⁴

The potential harm that may be caused to FairPoint if the preliminary injunction is granted appears to amount to the burden of continuing to carry GNAP's unpaid balance of alleged arrearages— a balance that is likely to grow unabated during the pendency of this proceeding, as GNAPs acknowledges an obligation to compensate FairPoint for its services, but to date has paid nothing at all toward any such obligation. Furthermore, at a time when it is in financial distress, FairPoint faces the additional, recurring harm of losing an opportunity as each month goes by to earn revenues from a replacement carrier that may, unlike GNAPs, pay for interconnection services.

The potential harm caused to GNAPs by denying the request for preliminary injunctive relief must be discounted by the probability that FairPoint will prevail in defending itself against any request GNAPs may make for permanent injunctive relief.²⁵ This discounting is hard to do, because who will prevail will depend in part on the facts, which are in dispute, and on the legal interpretation of a variety of contractual terms. Thus far, GNAPs has acknowledged a payment obligation to FairPoint and has not shown a likelihood of succeeding on the merits of its case, due to the unsettled nature of its telecommunications traffic and attendant questions of contractual interpretation that have yet to be examined in this proceeding. Therefore, at this

24. Tr. 10/13/09 at 87-88 (Skrivan).

25. GNAPs has requested that the Board "provide such other relief as [it] may deem to be just and appropriate." GNAPs Petition at 18.

time, it seems more probable than not that FairPoint will succeed in defending itself in this matter.

On balance, I am not able to conclude that GNAPs has established that the harm from denying its request for preliminary injunctive relief "will be greater than any injury which the granting of the preliminary injunction will cause" to FairPoint. Accordingly, I conclude that GNAPs' request for preliminary injunctive relief should be denied.

V. CONCLUSION

Finally, it bears noting that at the evidentiary hearing, FairPoint established — without contradiction from GNAPs— that FairPoint, to date, has not received any payment at all from GNAPs for the services it has rendered to GNAPs pursuant to the Interconnection Agreement.²⁶ At that same hearing, GNAPs admitted to having an obligation to pay FairPoint something for services rendered and, in fact, indicated a "willingness" to pay what GNAPs believes to be the "prevailing rate" in the industry for interconnection agreements.²⁷ I find these facts disturbing, given that GNAPs is seeking to invoke the protection of equity, which "'denotes the spirit . . . of fairness, justness, and right dealing'"²⁸ It is a time-honored principle of equity jurisprudence that "one who seeks relief in equity must come to court with clean hands"²⁹ As GNAPs acknowledges a payment obligation to FairPoint, and as FairPoint has established that GNAPs has not paid anything to date toward that obligation, it would appear that GNAPs has not yet done all it could to help itself before seeking the extraordinary equitable relief of a preliminary injunction.

For the reasons discussed above, I deny GNAPs' request for preliminary injunctive relief. Arguments made by any party that are inconsistent with this decision are hereby rejected.

SO ORDERED.

26. Tr. 10/13/09 at 72 (Skrivan).

27. Tr. 10/13/09 at 61-62 (Shaw).

28. *Starr Farm Beach Campowners Ass'n, Inc. v. Boylan*, 174 Vt. 503, 506-507, 811 A.2d 155, 160 (2002)(citation omitted).

29. *Savage v. Walker*, 2009 VT 8 ¶10, 969 A.2d 121, 125.

Dated at Montpelier, Vermont, this 24th day of November, 2009.

s/June E. Tierney
June E. Tierney, Esq.
Hearing Officer

OFFICE OF THE CLERK

FILED: November 24, 2009

ATTEST: s/Susan M. Hudson

Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.